




THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

**TO:** The Honorable Members of the Board of Regents

**FROM:** Jason Harmon 

**SUBJECT:** Proposed Amendment of Sections 100.4 and 100.21 of the Regulations of the Commissioner of Education to Provide Flexibility to Schools, Districts, and Charter Schools Regarding the Administration of Regents Examinations in Mathematics to Grade 6 Students and in Science to Grade 7 Students

**DATE:** June 30, 2022

**AUTHORIZATION(S):**



### SUMMARY

#### **Issue for Decision (Consent)**

Should the Board of Regents adopt the proposed amendment of sections 100.4 and 100.21 of the Regulations of the Commissioner of Education to provide flexibility to schools, districts, and charter schools regarding the administration of Regents Examinations in mathematics to grade 6 students and in science to grade 7 students?

#### **Reason for Consideration**

Review of policy.

#### **Proposed Handling**

The proposed amendment is presented to the Full Board for adoption as an emergency rule at its July 2022 meeting. A copy of the proposed rule is included as (Attachment A) and a statement of facts and circumstances justifying emergency action is included as (Attachment B).

## **Procedural History**

The proposed amendment was presented to the P-12 Education Committee for discussion and recommendation to the Full Board for adoption as an emergency rule at the June 2022 meeting of the Board of Regents. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on June 29, 2022, for a 60-day public comment period.

Because the June emergency action will expire on September 11, 2022, a second emergency action is necessary to ensure the emergency rule remains continuously in effect until it can be permanently adopted at the October 2022 Regents meeting. A Notice of Emergency Adoption will be published in the State Register on September 28, 2022. Supporting materials are available upon request to the Secretary of the Board of Regents.

## **Background Information**

Many districts and schools within New York State were historically reluctant to devote resources to providing high school coursework to middle school students. These districts and schools knew that the only results for which the middle school would be accountable were the grade-level assessments. Preparing students to take both the grade-level assessment and the Regents Examination was likely to result in their students attaining lower scores on the grade-level assessment than would be the case if the students were being prepared only for the middle-level examination. Consequently, some districts and schools were limiting participation in advanced coursework to those students who would be able to perform at high levels on both assessments, rather than including students who were likely to be successful on the Regents Examination if their teacher could focus the instruction on the learning standards associated with the high school course.

The Department and Board have taken various actions to provide flexibility and encourage the provision of advanced high school coursework to middle school students. At its October 2013 meeting, the Board of Regents directed the New York State Education Department (NYSED) to submit a request to the United States Department of Education (USDE) to waive provisions of sections 1111(b)(1)(B) and 1111(b)(3)(C)(i) of the Elementary and Secondary Education Act of 1965 (ESEA) to eliminate the need for “double-testing,” so that school districts and charter schools may administer only the Regents Examinations in mathematics to grade 7 and 8 students without also having to administer the grade-level mathematics assessment in the 2013-2014 school year. On December 20, 2013, USDE granted NYSED a one-year waiver for the 2013-2014 school year from ESEA [sections 1111(b)(1)(B) and 1111(b)(3)(C)(i)]. At the April 2014 Regents meeting, the Board of Regents adopted as a permanent rule, subdivisions 100.4(e)(2) and 100.18(b)(14) of the Commissioner's Regulations.

On September 22, 2014, USDE granted NYSED a one-year waiver extension (for the 2014-2015 school year) from the provisions of sections 1111(b)(1)(B) and 1111(b)(3)(C)(i) of the ESEA. The proposed amendment continued for the 2014-2015

school year the provisions that were implemented in the 2013-2014 school year to determine how student results were used for institutional accountability purposes:

- For students who attended grade 7 or 8 and took a Regents Examination in mathematics in the 2014-2015 school year but did not take the grade 7 or 8 mathematics assessment, participation and accountability determinations for the school in which the student attends grade 7 or 8 were based upon such student's performance on the Regents Examination in mathematics. Participation and accountability determinations for the high school in which such student later enrolled were based upon such student's performance on mathematics assessments taken after the student first entered grade 9. For such students, a score of 65 or above, or a comparable score as approved by the Board of Regents, on a Regents Examination in mathematics taken in grade 9 or thereafter were credited as Level 3 ("full credit") for purposes of calculating the high school performance index.
- For students who attended grade 7 or 8 and who took both the grade 7 or 8 mathematics assessment and a Regents Examination in mathematics during the 2014-2015 school year, participation, and accountability determinations for the school such students attended in grade 7 or 8 were based upon the student's performance on the grade 7 or 8 mathematics assessment.

On December 10, 2015, the Every Student Succeeds Act (ESSA) was signed into law. After an extensive public engagement process, USDE approved the State's ESSA plan in January 2018.<sup>1</sup>

Additionally, on January 16, 2018, USDE approved NYSED's request to grant a waiver extension of section 1111(b)(2)(B)(i)(I) of the ESEA, as well as the corresponding federal regulation, to allow middle school students who take a high school level Regents Examination in mathematics or science to use the results of that examination in lieu of the State's grade-level assessments. This approval was in effect for four years, from the 2017-2018 school year through the 2020-2021 school year.

On May 16, 2022, USDE granted NYSED a waiver extension that will be in effect from the 2021-2022 school year through the 2024-2025 school year and will permit the following:

- Students enrolled in grade 6 who take high school Regents mathematics courses may take the corresponding high school level Regents Examination in mathematics in lieu of the grade 6 mathematics test.

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<sup>1</sup> At its January 2019 meeting, as an emergency measure, the Board of Regents adopted new section 100.21 of the Commissioner's regulations, which reflects provisions provided by the waiver extension to New York's approved ESSA plan. This emergency measure was effective February 12, 2019.

- Students enrolled in grade 7 who take high school level Regents mathematics courses may take the corresponding high school level Regents Examination in mathematics in lieu of the grade 7 mathematics test.
- Students enrolled in grade 7 or 8 who take high school level Regents science courses may take the corresponding high school level Regents Examination in science in lieu of the Intermediate-Level Science test.

To secure the waiver extension of ESSA requirements, USDE required New York State to assure that if a student takes a Regents Examination in mathematics in Grade 6 or Grade 7 in lieu of the grade-level mathematics assessment or takes a Regents Examination in science in Grade 7 or Grade 8 in lieu of the Grade 8 science examination:

- The student’s performance and participation on the assessment will be used in the year in which the student takes the assessment for purposes of measuring academic achievement and participation as it pertains to the school-based accountability system required under ESSA.
- In high school, the student will take a more advanced, State-administered end-of-course assessment or a nationally recognized high school academic assessment and the student’s performance on and participation in that assessment will be used for purposes of measuring academic achievement and participation as it pertains to the school-based accountability system required under ESSA.

NYSED believes that the expansion of this waiver to include students who take Regents Examinations in mathematics in Grade 6 and Regents Examinations in Science in Grade 7 will provide exceptionally advanced middle school students with additional opportunities to participate in high school level coursework. In the 2018-2019 years, 959 students in Grade 7, and 51,964 students in Grade 8 took a Regents Examination in mathematics in lieu of the Grade 7 and 8 mathematics tests.<sup>2</sup> Similarly, in 2018-2019, 55,959 students in Grade 8 took a Regents Examination in science in lieu of the Grade 8 science tests<sup>3</sup>. Without a continuation of this waiver, many students will lose the opportunity to participate in advanced coursework during middle school. The Department, therefore, proposes these regulatory changes concomitant with the waiver extension.

### **Related Regents Items**

April 2014: [Proposed amendment of sections 100.4\(e\)\(2\) and 100.18\(b\)\(14\) of the Commissioner’s Regulations to provide flexibility to school districts and charter schools](#)

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<sup>2</sup> The number of students in Grade 6 who took a Regents Examination in lieu of the Grade 6 mathematics assessment was not reported in 2018-2019.

<sup>3</sup> The number of students in Grade 7 who took a Regents Examination in lieu of the Grade 7 science assessment was not reported in 2018-2019.

[regarding the administration of Regents Examinations in Mathematics \(Common Core\) to grade 7 and 8 students](https://www.regents.nysed.gov/common/regents/files/413brca3_0.pdf)

([https://www.regents.nysed.gov/common/regents/files/413brca3\\_0.pdf](https://www.regents.nysed.gov/common/regents/files/413brca3_0.pdf))

January 2019: [Proposed Emergency Adoption of Amendments to Sections 100.2\(ff\), 100.2\(m\), 100.18, 100.19, and Part 120 of the Commissioner's Regulations and the Addition of a New Section 100.21 of the Commissioner's Regulations Relating to the Implementation of the State's Approved Every Student Succeeds Act \(ESSA\) Plan](https://www.regents.nysed.gov/common/regents/files/219brca7.pdf)

(<https://www.regents.nysed.gov/common/regents/files/219brca7.pdf>)

June 2022: [Proposed Amendment of Sections 100.4 and 100.21 of the Regulations of the Commissioner of Education to Provide Flexibility to Schools, Districts, and Charter Schools Regarding the Administration of Regents Examinations in Mathematics to Grade 6 Students and in Science to Grade 7 Students](https://www.regents.nysed.gov/common/regents/files/622p12a4revised.pdf)

(<https://www.regents.nysed.gov/common/regents/files/622p12a4revised.pdf>)

### **Recommendation**

It is recommended that the Board of Regents take the following action:

VOTED: That sections 100.4 and 100.21 of the Regulations of the Commissioner of Education be amended, as submitted, effective September 12, 2022, as an emergency action upon a finding of the Board of Regents that such action is necessary for the preservation of the general welfare to allow students to forego being “double-tested” in grade 6 mathematics and in grade 7 intermediate science, and to ensure the emergency action taken at the June 2022 meeting remains continuously in effect.

### **Timetable for Implementation**

If adopted as an emergency rule at the July 2022 Regents meeting, the emergency rule will become effective September 12, 2022. It is anticipated that the proposed amendment will be presented for permanent adoption at the October 2022 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. If adopted at the October 2022 meeting, the proposed amendment will become effective as a permanent rule on October 19, 2022.

**Attachment A**

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 112, 207, 210, 215, 305, 309, and 3713 and the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802).

1. Subdivision (b) of section 100.4 of the Regulations of the Commissioner of Education is amended to read as follows:

(b) Program requirements for students in grades 5 and 6.

(1) ...

(2) Required assessments.

(i) ...

(ii) beginning with the 2005-06 school year, English language arts and mathematics assessments shall be administered in grades 5 and 6, provided that, beginning with the 2021-22 school year, students who attend grade 6 may take a Regents examination in mathematics in lieu of or in addition to the grade 6 mathematics assessment, in accordance with clause (b)(1)(xvi)(c) of section 100.21 of this Part.

(iii) ...

(iv) ...

(v) ...

(vi) ...

(vii) ...

(viii)

2. Subdivision (e) of section 100.4 of the Regulations of the Commissioner of Education is amended to read as follows:

(e) Required assessments in grades 7 and 8.

Except as otherwise provided in subdivisions (f) and (g) of this section, and except for students who have been admitted to a higher grade without completing the grade at which the assessment is administered, all students shall take the following assessments, provided that testing accommodations may be used as provided for in section 100.2(g) of this Part in accordance with department policy.

(1) ...

(2) ...

(3) ...

(4) Beginning with the school year 2000-2001, the science intermediate assessment shall be administered in grade 8; provided that students who attend grade 7 or 8 may take a Regents examination in science in lieu of or in addition to the grade 8 science intermediate assessment, in accordance with this section and section [100.18(b)(14)] 100.21(b)(ii)(c)-(d) of this Part, and provided further that the science intermediate assessment shall not be administered in grade 8 to students who take such assessment in grade 7 and are being considered for placement in an accelerated high school-level science course when they are in grade 8 pursuant to subdivision (d) of this section or have taken a Regents examination in science in grade 7 in lieu of or in addition to the grade 8 science intermediate assessment.

3. Subdivision (b) of section 100.21 of the Regulations of the Commissioner of Education is amended to read as follows:

(b) Definitions.

(i) ....

(ii) ....

(iii) ...

(iv) ...

(v) ...

(vi) ...

(vii) ...

(viii) ...

(ix) ...

(x) ...

(xi) ...

(xii) ...

(xiii) ...

(xiv) ...

(xv)...

(xvi) Performance levels shall mean for accountability determinations regarding comprehensive support and improvement schools, targeted support and improvement schools, and target districts made commencing with the 2017-2018 school year assessment results, as follows:

(a) for elementary and middle grades:

(1) Level 1 - basic:

(i) a score of Level 1 on State assessments in ELA, mathematics, and science;



(ii) a score of Level 1 on the New York State alternate assessment in ELA, mathematics, and science;

(iii) a score of accountability Level 1 on a Regents mathematics exam for advanced grade 6, 7, or 8 students;

(iv) a score of Level 1 on a Regents science exam for advanced grade 7 or 8 students;

(2) Level 2 - basic proficient:

(i) a score of Level 2 on State assessments in ELA, mathematics, and science;

(ii) a score of Level 2 on the New York State alternate assessment in ELA, mathematics, and science;

(iii) a score of accountability Level 2 on a Regents mathematics exam for advanced grade 6, 7, or 8 students;

(iv) a score of Level 2 on a Regents science exam for advanced grade 7 or 8 students.

(3) Level 3 - proficient:

(i) a score of Level 3 on State assessments in ELA, mathematics, and science;

(ii) a score of Level 3 on the New York State alternate assessment in ELA, mathematics, and science;

(iii) a score of accountability Level 3 on a Regents mathematics exam for advanced grade 6, 7, or 8 students;

(iv) a score of Level 3 on a Regents science exam for advanced grade 7 or 8 students.

(4) Level 4 - advanced:

(i) a score of Level 4 on State assessments in ELA, mathematics, and science;  
(ii) a score of Level 4 on the New York State alternate assessment in ELA, mathematics, and science;

(iii) a score of accountability Level 4 on a Regents mathematics examination for advanced grade 6, 7, or 8 students;

(iv) a score of Level 4 on a Regents science examination for advanced grade 7 or 8 students.

(b) ...

(c) advanced middle school mathematics students:

(1) for students enrolled in grades 6, 7, or 8 and who take a Regents examination in mathematics but do not take the grade 6, 7, or 8 New York State testing program assessment in mathematics, participation and accountability determinations for the school in which the student is enrolled in grade 6, 7 or 8 shall be based upon such student's performance on the Regents examination in mathematics. Participation and accountability determinations for the high school in which such student later enrolls shall be based upon such student's performance on mathematics assessments taken after the student first enters grade 9;

(2) for students enrolled in grades 6, 7, or 8 who take both the grade 6, 7, or 8 New York State testing program assessment in mathematics and a Regents examination in mathematics, participation and accountability determinations for the school in which the student is enrolled in grade 6, 7, or 8 shall be based upon such student's performance on the New York State testing program assessment in mathematics. Participation and accountability determinations for the high school in

which such student later enrolls shall be based upon such student's highest performance level/score earned on the Regents examination taken in grade 6, 7, or 8 or Regents examinations or approved alternatives of Regents examinations taken after the student first enters grade 9;

(d) advanced middle school science students:

(1) for students enrolled in grade 7 or 8 who take a Regents examination in science but do not take the grade 8 intermediate science test, accountability determinations for the school in which such student is enrolled in grade 7 or 8 shall be based upon such student's performance on the Regents examination in science. Participation and accountability determinations for the high school in which such student later enrolls shall be based upon such student's performance on science assessments after the student first enters grade 9;

(2) for students enrolled in grade 7 or 8 who take both the grade 8 science intermediate-level science test and a Regents examination in science, accountability determinations for the school in which such student is enrolled in grade 7 or 8 shall be based upon such student's performance on the grade 8 intermediate-level science test. Participation and accountability determinations for the high school in which such student later enrolls shall be based upon such student's highest performance level/score earned on the Regents examination taken in grade 7 or 8 or Regents examinations taken after the student first enters grade 9;

(3) for students who took the grade 8 intermediate-level science test when they were enrolled in grade 7 and who take a Regents examination in science when enrolled in grade 7 or 8, accountability determinations for the school in which such student is

enrolled in grade 8 shall be based upon such student's performance on the Regents examination in science;

(4) for students who have taken the grade 8 science intermediate assessment when enrolled in grade 7 and who do not take a Regents examination in science when enrolled in grade 7 or 8, accountability determinations for the school in which the student is enrolled in grade 8 shall be based upon the student's performance on the grade 8 intermediate-level test taken in grade 7.

STATEMENT OF FACTS AND CIRCUMSTANCE WHICH NECESSITATE  
EMERGENCY ACTION

On March 9, 2022, the New York State Education Department (NYSED) submitted a waiver extension request to USDE on behalf of all local education agencies (LEAs) in New York State seeking flexibility that would allow New York middle school students to take a Regents Examination in mathematics or science when the student is enrolled in the corresponding course instead of taking the grade level examination. USDE granted NYSED a waiver extension of the following flexibilities of sections 1111(b)(1)(B) and 1111(b)(2)(B)(i) of the ESEA, as recently amended by ESSA:

- Students enrolled in grade 6 who take high school regents mathematics courses to take the corresponding high school level Regents Examination in mathematics in lieu of the grade 6 mathematics test.
- Students enrolled in grade 7 who take high school level regents mathematics courses to take the corresponding high school level Regents Examination in mathematics in lieu of the grade 7 mathematics test.
- Students enrolled in grade 7 or 8 who take high school level regents science courses to take the corresponding high school level Regents Examination in science in lieu of the Intermediate-Level Science test.

As a result, it is necessary for NYSED to adopt emergency regulations to conform to the waiver granted by USDE. The proposed amendment provides continued flexibility related to implementing these middle school mathematics and science testing flexibilities beginning with the 2021– 2022 school year assessments.

The proposed amendment was presented to the P-12 Education Committee for recommendation to the Full Board for adoption as an emergency rule at the June 2022 meeting of the Board of Regents, effective June 14, 2022. Because the Board of Regents meets at scheduled intervals, the earliest the proposed amendment could be presented for regular (non-emergency) adoption, after publication in the State Register and expiration of the 60-day public comment period required in the SAPA sections 201(1) and (5), is October 2022. Furthermore, pursuant to SAPA 203(1), the earlier effective date of the proposed rule, if adopted at the October meeting, would be October 19, 2022, the date the Notice of Adoption would be published in the State Register.

However, the emergency rule will expire on September 11, 2022. Therefore, A second emergency action is necessary at the July 2022 meeting, effective July 12, 2022, for the preservation of the general welfare such that students are not required to undergo “double testing” In grade 6 mathematics and in grade 7 intermediate science, and to ensure the emergency action taken at the June 2022 meeting remains continuously in effect.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at the October 2022 Board of Regents meeting, which is the first scheduled meeting after the 60-day public comment period prescribed in SAPA for State agency rulemakings.